

ROBERT A. MASON, on behalf of
himself, all others similarly situated and
the general public,

Plaintiff,

V.

HEEL, INC., a New Mexico
Corporation,

Defendant.

Case No. 3:12-cv-03056-GPC-KSC

FINAL ORDER: (1) APPROVING CLASS ACTION SETTLEMENT, (2) AWARDING CLASS COUNSEL PARTIAL FEES AND EXPENSES, (3) AWARDING CLASS REPRESENTATIVE INCENTIVE AWARD, (4) PERMANENTLY ENJOINING PARALLEL PROCEEDINGS, AND (5) DISMISSING ACTION WITH PREJUDICE

PROCEDURAL HISTORY

On December 21, 2012, plaintiff Robert A. Mason (“Plaintiff”) filed a complaint against defendant Heel, Inc. (“Defendant”), alleging: (1) violations of California’s Unfair Competition Law (“UCL”), California Business and Professions Code Section 17200 et seq.; (2) violations of California’s False Advertising Law (“FAL”), California Business and Professions Code Section 17500 et seq.; (3) violations of California’s Consumer Legal Remedies Act (“CLRA”), California Civil Code Section 1750 et seq.; (4) breach of express and implied warranties; and (5) violation of the Magnuson-Moss Warranty Act (“MMWA”), 15 U.S.C. § 2301 et seq.

1 (ECF No. 1, Compl.)

2 Defendant manufactures, markets, and sells certain homeopathic products in the
 3 United States. Plaintiff alleges “Defendant’s marketing and promotion of its products
 4 was supported by false and misleading claims containing material omissions and
 5 misrepresentations.” (Compl. ¶ 76.) Defendant denies these allegations.

6 After arms-length settlement discussions, the parties entered into a Settlement
 7 Agreement dated July 24, 2013 (“Agreement” or “Settlement Agreement”). Currently
 8 pending before the Court is Plaintiff’s Motion for Final Approval of the Settlement
 9 Agreement, along with Plaintiff’s Motion for Attorneys’ Fees and Incentive Award for
 10 the Class Representative. Having considered the parties’ submissions, and having
 11 received no objections to any terms contained in the Settlement Agreement, the Court
 12 will **GRANT** Plaintiff’s Motion for Final Approval of Class Action Settlement.

13 On October 30, 2013, the Court entered its Order (1) Preliminarily Approving
 14 Class Action Settlement, (2) Certifying Class, (3) Appointing Class Representative
 15 and Lead Class Counsel, (4) Approving Notice Plan, and (5) Setting Final Approval
 16 Hearing (“Preliminary Approval Order”), in which it preliminarily approved the
 17 Settlement. (ECF No. 27.) The Court also scheduled a hearing to determine whether
 18 the Settlement is fair, reasonable, adequate, in the best interests of the Class, and free
 19 from collusion, such that the Court should grant Final Approval of the Settlement, and
 20 to consider Plaintiff’s motion for an award of attorneys’ fees, costs, and litigation
 21 expenses, and incentive for the Class Representative (“Fairness Hearing”).

22 The Court has considered:

- 23 • Plaintiff’s Motion for Final Approval of Class Action Settlement, along with
 24 the memorandum of points and authorities, declarations, and exhibits
 25 submitted therewith (“Final Approval Motion”), (ECF No. 34);
- 26 • Defendant’s Notice of Non-opposition to the Final Approval Motion, along
 27 with the declaration submitted therewith, (ECF No. 35);
- 28 • Plaintiff’s Motion for Attorneys’ Fees, Costs and Incentive Award, along

1 with the declarations and exhibits submitted therewith (“Fee Motion”), (ECF
2 No. 30);

- 3 • the Settlement Agreement, (ECF Nos. 25-1 (sealed), 26-2 (redacted));
- 4 • the entire record in this matter, including, but not limited to, the parties’
5 submissions in support of their Joint Motion for Preliminary Approval of
6 Class Action Settlement, (ECF Nos. 25, 26);
- 7 • the Notice Plan, providing full and fair notice to the Class, (ECF No. 26-2 at
8 80-84);
- 9 • the absence of any objections to the Settlement Agreement by Class
10 Members;
- 11 • the absence of any requests to opt-out of the Settlement by Class Members;
- 12 • the absence of any objection or response by any official after the provision
13 of all notices required by the Class Action Fairness Act of 2005, 28 U.S.C.
14 §1715;
- 15 • the oral presentations of Class Counsel and Counsel for Defendant at the
16 Fairness Hearing;
- 17 • this Court’s experiences and observations while presiding over this matter;
18 and
- 19 • the relevant law.

20 Based upon these considerations and the Court’s findings of fact and
21 conclusions of law as set forth in the Preliminary Approval Order and in this Final
22 Approval Order (1) Approving Class Action Settlement, (2) Awarding Class Counsel
23 Partial Fees and Expenses, (3) Awarding Class Representative Incentive, (4)
24 Permanently Enjoining Parallel Proceedings, and (5) Dismissing Action with
25 Prejudice (“Final Approval Order”), and good cause appearing, **IT IS HEREBY**
26 **ORDERED:**

27 **1. Definitions.** The capitalized terms used in this Final Approval Order
28 shall have the meanings and/or definitions given to them in the Settlement Agreement

1 or, if not defined therein, the meanings and/or definitions given to them in this Final
 2 Approval Order.

3 **2. Incorporation of Documents.** This Final Approval Order incorporates
 4 the Settlement Agreement, including all exhibits thereto, and the Court's findings and
 5 conclusions contained in its Preliminary Approval Order.

6 **3. Jurisdiction.** The Court has personal jurisdiction over the Parties, the
 7 Class Members, including objectors, and Defendant. All Class Members who have
 8 not excluded themselves according to the procedures set forth in the Court's
 9 Preliminary Approval Order are deemed to have consented to the personal jurisdiction
 10 of this Court for purposes of this action, including the final approval of the Settlement
 11 Agreement. The Court has subject-matter jurisdiction over this action, including,
 12 without limitation, jurisdiction to approve the Settlement, to dispose of all claims
 13 alleged in this action (including the Released Claims), to resolve any objections to the
 14 Settlement, and to dismiss this action with prejudice.

15 **Findings and Conclusions**

16 **4. Definition of the Class and Class Members.** The Court's Preliminary
 17 Approval Order defines the "Class," which is comprised of the "Class Members," as
 18 follows:

19 All U.S. consumers who purchased the Products listed in Exhibit D to the
 20 Agreement, for household or personal use, during the Class Period (as
 21 defined by Paragraph 1.7 of the Agreement) are included. Excluded from
 22 the Class are: Heel; persons who during or after the Class Period were
 23 officers or directors of Heel, or any corporation, trust or other entity in
 24 which Heel has a controlling interest; Heel employees; the members of the
 immediate families of Heel employees or their successors, heirs, assigns
 and legal representatives; and any judicial officer hearing this Litigation, as
 well as their immediate family members and employees.

25 As set forth in the Preliminary Approval Order and in the following section, the Court
 26 finds the requirements for certifying a Rule 23(b)(2) and (b)(3) class are satisfied. All
 27 Class Members are therefore subject to this Final Approval Order.

28 ///

1 **5. Class Certification (Rule 23)**

2 **A. Numerosity**

3 Defendant's relevant sales in the United States are in the millions of dollars
 4 annually, meaning Defendant has presumably sold its products to thousands of
 5 individuals nationwide. (See ECF No. 25-4, Decl. Christian Grimm ¶ 5.) The Court
 6 therefore continues to finds the Class is sufficiently numerous under Rule 23(a)(1).

7 **B. Commonality**

8 The Court finds the primary question of fact in this case—to wit, whether the
 9 uniform labeling of Defendants' Products was false or deceptive—is common to the
 10 Class. All Class Members allege the same injury: loss of money spent purchasing the
 11 Products that Plaintiff alleges were deceptively labeled. All Class Members were
 12 exposed to the same labeling materials, which material made claims regarding the
 13 level of dilution in the Products, as represented by an "X" in the ingredients list.
 14 Resolving the common question of whether Defendant's labeling claims were
 15 deceptive would resolve a substantial portion of Plaintiff's claims in one stroke. No
 16 party or objector contests commonality. Accordingly, the Court continues to find the
 17 commonality requirement under Rule 23(a)(2) satisfied.

18 **C. Typicality**

19 The Court finds Plaintiff's claims are reasonably co-extensive with, and indeed
 20 identical to, those of the Class. The Court thus continues to find Rule 23(a)(3)'s
 21 typicality requirement satisfied.

22 **D. Adequacy of Class Representative**

23 Having considered the factors set forth in Rule 23(g)(1), the Court finds that
 24 Plaintiff and Class Counsel are adequate class representatives. Class Counsel has
 25 fully and competently prosecuted all causes of action, claims, theories of liability, and
 26 remedies reasonably available to the Class Members. The Court therefore continues
 27 to find it appropriate for the Law Offices of Ronald A. Marron to serve as Class
 28 Counsel. The Court also continues to find it appropriate for Robert A. Mason to serve

1 as Class Representative, finding that he possesses no interests adverse to the Class and
 2 that he has demonstrated his willingness and ability to adequately represent the Class.

3 **E. Rule 23(b) Has Been Satisfied**

4 For purposes of this Settlement, the Court finds the requirements of subsections
 5 (b)(2) and (b)(3) of Rule 23 have been met. The Court continues to find 23(b)(2)'s
 6 requirements satisfied because the labeling of Defendant's products applied generally
 7 to the Class, and a significant portion of the relief provided to Class Members under
 8 the Settlement Agreement consists of injunctive relief in the form changes to the
 9 labels of Defendant's Products. The Court also continues to find 23(b)(3)'s
 10 requirements satisfied. The Court finds the common question of whether the uniform
 11 labeling of Defendant's Products was false or deceptive predominates over any
 12 individualized questions. The Court also finds that resolution on a class-wide basis is
 13 superior than alternative options for purposes of judicial efficiency and to provide a
 14 forum for absent Class Members, who are unlikely to bring individual suits to recover
 15 the sum of approximately \$25.00 per Product.

16 **6. The Settlement.** The Court finds the Settlement is fair, reasonable, and
 17 adequate to the Class, in light of the complexity, expense, and likely duration of the
 18 Litigation, and the risks involved in establishing liability, damages, and in maintaining
 19 the action as a class action, through trial and appeal. *See Rodriguez v. West Publ'g*
 20 *Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). The Settlement is the result of arms-length
 21 negotiations, and there is no evidence of collusion or other conflicts of interest
 22 between Plaintiff, Class Counsel, and the Class. *In re Bluetooth Headset Prods. Liab.*
 23 *Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

24 **A.** The Parties reached the proposed Settlement only after proceeding
 25 with voluntary investigation and discovery in this action, and following several
 26 months of negotiations before a capable and well-respected mediator, the Honorable
 27 Leo S. Papas (Ret.) of Judicate West. Between February 2013 and July 2013, the
 28 parties engaged in extensive negotiations, including joint and individual mediation

1 sessions with Judge Papas, and the parties' own follow-up negotiations, in order to
2 reach agreement over the specific terms of the Settlement.

3 Plaintiff and Class Counsel maintain that this action and the claims asserted
4 herein are meritorious and that Plaintiff and the Class would have prevailed at trial.
5 Notwithstanding this position, Plaintiff and Class Counsel have agreed to settle the
6 Litigation pursuant to the provisions of the Settlement Agreement, after considering,
7 among other things: (i) the substantial benefits to Plaintiff and the Class under the
8 terms of the Settlement Agreement; (ii) the uncertainty of being able to prevail at trial;
9 (iii) the uncertainty relating to Defendant's defenses and the expense of additional
10 motion practice in connection therewith; (iv) the issues related to proving damages on
11 an individual basis; (v) the attendant risks, difficulties, and delays inherent in
12 litigation; and (vi) the desirability of consummating this Settlement promptly in order
13 to provide effective relief to Plaintiff and the Class. Plaintiff and Class Counsel agree
14 the Settlement is fair, reasonable, and adequate because it provides substantial benefits
15 to the Class, is in the best interests of the Class, and fairly resolves the claims alleged
16 in this action.

17 Defendant expressly denies any wrongdoing alleged in Plaintiff's Complaint,
18 and does not admit or concede any actual or potential fault, wrongdoing, or liability in
19 connection with any facts or claims which have been or could have been alleged
20 against it in the action. Defendant asserts that it sells, manufactures, and markets its
21 Products in accordance with well-recognized and widely-accepted homeopathic
22 principles that have been adopted by the Food and Drug Administration ("FDA").
23 The FDA polices and enforces federal rules and regulations regarding homeopathic
24 drug labels—rules and regulations with which Defendant avows it is in compliance.
25 Defendant nonetheless considers it desirable for the action to be settled and dismissed
26 because the proposed Settlement will: (i) avoid further expense and disruption of the
27 management and operation of Defendant's businesses due to the pendency and
28 defense of the action; (ii) finally put the claims of Plaintiff and the Class to rest; and

1 (iii) avoid the substantial expense, burdens, and uncertainties associated with a
 2 potential finding of liability and damages on the claims alleged in the Complaint.

3 The parties also fully briefed an extensive motion to dismiss in this action,
 4 which included, *inter alia*, claims and defenses with regard to the Food, Drug and
 5 Cosmetic Act (“FDCA”), 21 U.S.C. § 301 et seq., including whether the FDCA
 6 preempts the consumer-fraud claims asserted by Plaintiff and whether Plaintiff may
 7 claim that Defendant lacks clinical proof supporting its claims about the Products. As
 8 noted above, the parties also engaged in voluntary discovery and mediation efforts.
 9 Moreover, Class Counsel and Counsel for Defendant are experienced civil litigators
 10 with general knowledge of complex class-action litigation and the ability to assess the
 11 risks, expenses, and duration of such litigation. Class Counsel and Counsel for
 12 Defendant also possess specialized knowledge of food-and-drug labeling issues in
 13 particular. It may thus be said that the parties were fully informed of the legal bases
 14 for the claims and defenses asserted herein and were thus capable of balancing the
 15 risks of continued litigation and the benefits of the Settlement.

16 **B.** The Settlement provides for fair, reasonable, and adequate cash
 17 payments and/or other monetary benefits to every Class Member, with a common
 18 fund of \$1 million and payments of up to \$150 for each Class Member that submits
 19 proof(s) of purchase for the Products with a Claim Form, and up to \$100 for each
 20 Class Member that does not submit receipts or evidence of purchase (such as
 21 packaging), but who signs a Claim Form under penalty of perjury. No portion of the
 22 substantial Settlement relief will revert to Defendant. Any excess monies in the
 23 Settlement Fund, after payment of all Valid Claims, attorneys’ fees and expenses,
 24 incentive award, claims administrator fees and expenses, and taxes shall be distributed
 25 as follows: (i) 50% as a pro rata supplemental cash payment to all Class Members that
 26 submitted a Valid Claim Form, and (ii) 50% as a *cy pres* award to Consumers Union,
 27 a non-profit organization dedicated to enhancing consumer understanding in the realm
 28 of drug labeling.

1 The Settlement also affords meaningful injunctive relief. First, in order to
 2 address concerns that consumers may not be aware that homeopathic products have
 3 not been subject to the same FDA scrutiny as allopathic drugs, Defendant has agreed
 4 to provide the following FDA Disclaimer to inform consumers with regard to the
 5 Products' claims of efficacy: "These statements have not been evaluated by the Food
 6 and Drug Administration." (Settlement Agreement ¶ 4.1.2.)

7 Second, to address Plaintiff's concern that homeopathic labels do not
 8 sufficiently explain the concept of a homeopathic dilution, Defendant has agreed to
 9 provide a Dilution Disclaimer in close proximity to the Drug Facts panel on each of its
 10 labels, which shall state: "'X' is a homeopathic dilution: see [www.\[link created pursuant to ¶ 4.1.4 of the Settlement\]](http://www.[link created pursuant to ¶ 4.1.4 of the Settlement]) for details." (*Id.* ¶ 4.1.3.) The identified
 11 webpage shall provide consumers a more detailed explanation of the dilutions. (*Id.* ¶
 12 4.1.4.) For consumers wishing more information about homeopathy, Defendant shall
 13 also include a link to the FDA website's Compliance Policy Guide § 400.400 for
 14 homeopathic drugs on all websites Defendant owns or operates in a reasonably
 15 accessible location. (*Id.* ¶ 4.1.4.4.)

16 Third, Defendant has agreed that it shall not use the words "Natural," "All
 17 Natural," "100% Natural," or similar language on any of the Products unless
 18 Defendant qualifies that language by referring only to those ingredients that are
 19 natural. (*Id.* ¶ 4.1.7.)

20 Fourth, Defendant shall not use the words "Clinically Proven," on any of the
 21 Products for which it does not possess two, independent, randomized, double-blind,
 22 placebo-controlled human clinical trials. (*Id.* ¶ 4.1.8.)

23 Fifth, Defendant shall not use the words "Doctor Recommended," or similar on
 24 any of the Products unless Defendant qualifies whether any doctors that recommend
 25 the Products are homeopathic practitioners or allopathic physicians.

26 The Court has considered the realistic range of outcomes in this matter,
 27 including the amount Plaintiff might receive if he prevailed at trial on behalf of

1 himself and/or the Class, the strengths and weaknesses of the case, the novelty and
 2 number of complex legal issues involved, and the risk that Plaintiff and the Class
 3 would receive less than the relief provided under the Settlement Agreement or take
 4 nothing at trial. The relief offered under the Settlement is fair, reasonable, and
 5 adequate in view of these factors.

6 **C.** The Court has found no evidence of collusion between Plaintiff
 7 and Defendant or their respective counsel. The Settlement resulted from arms-length,
 8 adversarial negotiations. Up to and through Settlement, the parties litigated and
 9 negotiated this action as the Court would expect of adversarial parties.¹ Further, the
 10 Court has evaluated the factors set forth by the Ninth Circuit for determining whether
 11 the parties have colluded, finding no evidence of collusion. *See In re Bluetooth*
 12 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (the three factors are:
 13 “(1) when counsel receive a disproportionate distribution of the settlement, . . . (2)
 14 when the parties negotiate a ‘clear sailing’ arrangement providing for the payment of
 15 attorneys’ fees separate and apart from class funds, . . . and (3) when the parties
 16 arrange for fees not awarded to revert to defendants . . .”).

17 Class Counsel has requested 30% of the Settlement Fund, which the Court finds
 18 is above the benchmark for class-counsel fee awards in a common-fund settlement,
 19 though still within the range of fees awarded by other courts in the Ninth Circuit. *See*
 20 *Fischel v. Equitable Life Assurance Society of U.S.*, 307 F.3d 997, 1006 (9th Cir.
 21 2002) (“We have established a 25 percent ‘benchmark’ in percentage-of-the-fund
 22 cases that can be ‘adjusted upward or downward to account for any unusual

23
 24

¹ Class Counsel examined and evaluated the relevant facts and law to assess the merits of the
 25 instant claims and to determine how best to serve the interests of Plaintiff and the Class. In doing
 26 so, Class Counsel reviewed a substantial amount of evidence produced by Defendant consisting of
 27 marketing data, label and package mechanicals, sales figures, unit sales, detailed advertising
 28 information, scientific studies, lists of recommending doctors, and detailed financial information.
 Class Counsel is also experienced in prosecuting claims alleging deceptive advertising by
 homeopathic drug manufacturers, along with food and diet supplement class actions in general.
 (See ECF No. 26-2, Marron Decl. ¶¶ 7-8, 13-20.)

1 circumstances involved in [the] case.”” (citation omitted)). Defendant also retained
2 the right to oppose the Fee Motion to the extent Plaintiff’s Fee Application exceeded
3 five percent over the benchmark common fund percentage in the Ninth Circuit. No
4 portion of the Settlement Fund reverts to Defendant. The Parties also agreed to the
5 terms of the Settlement before discussing attorneys’ fees, another factor which weighs
6 against a finding of collusion. *See, e.g. Weeks v. Kellogg Co.*, 2011 U.S. Dist. LEXIS
7 155472, at *83 (C.D. Cal. Nov. 23, 2011).

8 **D.** The response of the Class to this action, the certification of a class,
9 and the Settlement, including Class Counsel’s application for an award of attorneys’
10 fees, litigation expenses, and the Class Representative’s incentive, after full, fair, and
11 effective notice thereof, strongly favors final approval of the Settlement. Out of the
12 estimated millions who received Notice, no class members submitted valid requests
13 for exclusion. Moreover, no objections were filed. These Court has considered these
14 results as favoring final approval of the Settlement.

15 **7. Notice to the Class.** The Class has received the best practicable notice in
16 light of the fact that Defendant does not collect or maintain information sufficient to
17 identify Class Members. The Parties’ selection and retention of SEOmap as the
18 Settlement Administrator was reasonable and appropriate. Based on the Declaration
19 of Gajan Retnasaba of SEOmap, the Court hereby finds that the Settlement Notices
20 were published to the Class Members in the form and manner approved by the Court
21 in its Preliminary Approval Order. (ECF No. 34-2.) The Settlement Notices provided
22 fair, effective, and the best practicable notice to the Class of the Settlement and the
23 terms thereof. The Notices also informed the Class of Plaintiff’s intent to seek
24 attorneys’ fees, costs, and an incentive payment, and set forth the date, time, and place
25 of the Fairness Hearing and Class Members’ rights to object to the Settlement or Fee
26 Motion and to appear at the Fairness Hearing. The Court further finds that the
27 Settlement afforded Class members a reasonable period of time to exercise such
28 rights. *See Weeks v. Kellogg Co.*, 2011 U.S. Dist. LEXIS 155472, at *82 (C.D. Cal.

1 Nov. 23, 2011) (class members' deadline to object or opt out must arise after class
 2 counsel's fee motion is filed); *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d
 3 988, 994 (9th Cir. 2010) (same). The Settlement Notices fully satisfied all notice
 4 requirements under the law, including the Federal Rules of Civil Procedure, the
 5 requirements of the California Legal Remedies Act, Cal. Civ. Code § 1781, and all
 6 due process rights under the U.S. Constitution and California Constitutions.

7 **8. Notices Pursuant to 28 U.S.C. § 1715.** The Court finds Defendant has
 8 satisfied all notice requirements of the Class Action Fairness Act of 2005 (“CAFA”),
 9 28 U.S.C. § 1715, as attested to by the Declaration of Matthew G. Ball. (ECF No. 35-
 10 1.) On October 29 and 30, 2013, Defendant served the notices required by 28 U.S.C.
 11 § 1715(b), which included a copy of the Settlement Agreement and other required
 12 documents, as well as notice of the date, time, and place of the Fairness Hearing. The
 13 Court has received no objection or response to the Settlement agreement by any
 14 federal or state official, including any recipient of the foregoing notices. This fact
 15 further supports the fairness of the Settlement.

16 **9. Implementation of Settlement.** The Parties are directed to implement
 17 the Settlement according to its terms and conditions.

18 **10. Appeal after Implementation.** Any Class Member who failed timely
 19 and validly to object to the Settlement has waived any objection. Any Class Member
 20 seeking to appeal the Court's rulings must: (a) move to intervene upon a
 21 representation of inadequacy of counsel (if they did not object to the proposed
 22 Settlement under the terms of the Settlement); (b) request a stay of implementation of
 23 the Settlement; and (c) post an appropriate bond. Absent satisfaction of all three
 24 requirements, Defendant is authorized, at its sole option and in its sole discretion, to
 25 proceed with the implementation of the Settlement, including before the Effective
 26 Date, even if such implementation would moot any appeal.

27 **11. Release.** The Release set forth in the Settlement Agreement is expressly
 28 incorporated herein in all respects, is effective as of the date of the entry of this Final

1 Approval Order, and forever discharges the Released Parties from any claims or
2 liabilities released by the Settlement, including the Released Claims, and including
3 without limitation a waiver of all rights under Section 1542 of the California Civil
4 Code. This Release covers, without limitation, any and all claims for attorneys' fees
5 and expenses, costs or disbursements incurred by Class Counsel, the Settlement of this
6 Action, the administration of such Settlement, and the Released Claims, except to the
7 extent otherwise specified in this Order and the Settlement Agreement.

8 **12. Binding Affect and Permanent Injunction.** The Settlement and this
9 Final Approval Order shall be forever binding on the Plaintiff and all other Class
10 Members, as well as their heirs, executors and administrators, successors and assigns,
11 and shall have *res judicata* and other preclusive effect in all pending and future
12 claims, lawsuits or other proceedings maintained by or on behalf of any such persons,
13 to the fullest extent allowed by law. The Court hereby permanently enjoins all Class
14 Members from filing, commencing, prosecuting, intervening in, maintaining,
15 participating (as class members or otherwise) in, or receiving any benefits from, any
16 lawsuit (including putative class action lawsuits), arbitration, administrative or
17 regulatory proceeding or order in any jurisdiction asserting any claims released by this
18 Order; and from organizing Class Members into a separate class to pursue as a
19 purported class action any lawsuit (including by seeking to amend a pending
20 complaint to include class allegations, or seeking class certification in a pending
21 action) asserting any claims released by this Order. Nothing in this paragraph,
22 however, shall require any Class Member to take any affirmative action with regard to
23 other pending class action litigation unrelated to this action in which they may be
24 absent class members. Defendant has reserved the right to file motions or to take
25 other actions to enforce the release provisions of the Settlement Agreement and of this
26 injunction, as they may deem appropriate. The Court finds that issuance of this
27 permanent injunction is necessary and appropriate in the aid of the Court's jurisdiction
28 over the action and its judgments.

1 **13. Attorneys' Fees and Litigation Expenses.**

2 The Court orders that Class Counsel is entitled to an award of reasonable
 3 attorneys' fees and litigation expenses incurred in connection with the action and in
 4 reaching this Settlement, to be paid at the time and in the manner provided in the
 5 Settlement Agreement. The fee award sought in the present case is reasonable when
 6 judged by the standards of this circuit.

7 In common-fund cases, such as this, courts have discretion to use either a
 8 percentage or lodestar method when evaluating class counsel's request for attorneys'
 9 fees. *Hanlon*, 150 F.3d at 1029. Applying the percentage of the common fund
 10 method is appropriate in this case, as there exists a common fund in an amount
 11 certain. The Ninth Circuit "has established 25% of the common fund as a benchmark
 12 award for attorney fees." *Id.* Class Counsel asserts a 30% fee award is justified here
 13 per the results obtained, the experience and skill of Counsel, the complexity of issues,
 14 the risk of non-payment and preclusion of other work, the reaction of the Class, and
 15 the fact that Defendant is required to provide greater disclosure regarding
 16 homeopathic products than the FDA now requires.

17 The Court disagrees that a deviation from the benchmark is appropriate in this
 18 case. Even considering the parties' out-of-court investigative, discovery, mediation,
 19 and negotiation efforts, the Court finds nothing takes this case out of the ordinary
 20 realm of consumer class actions involving deceptive marketing. Indeed, the fact that
 21 this case settled before the pleadings were settled and before Plaintiff even moved for
 22 class certification distinguishes this case from those circumstances where a deviation
 23 from the benchmark might be justified. The Court thus finds an award that is
 24 consistent with the 25% benchmark to be reasonable. The Court therefore awards
 25 Class Counsel \$250,000.00 in attorneys' fees.

26 The reasonableness of the fee award is supported by a lodestar cross-check
 27 analysis. To determine the lodestar amount, "the number of hours reasonably
 28 expended on the litigation [is] multiplied by a reasonable hourly rate." Hensley v.

1 Eckerhart, 461 U.S. 424, 433 (1983). This figure may then be adjusted upward or
 2 downward after considering the *Kerr* factors.²

3 Assuming the hours Class Counsel expended were reasonable (Class Counsel
 4 does not provide any billing records) and Class Counsel's hourly rates were
 5 reasonable (the Court finds they are slightly inflated), the Court calculates a lodestar
 6 amount of \$268,851.50. (See ECF No. 30-1 at 37, Fee Mot., App. 1.) This amount
 7 includes 150 additional hours that Class Counsel estimates it will expend on post-Fee
 8 Application hours.

9 The Court is not inclined to increase the lodestar amount under the *Kerr* factors.
 10 While the Court notes the excellent results for the Class, along with Class Counsel's
 11 experience, reputation, and ability to litigate class actions of this nature, the Court
 12 finds this is not an exceptional case in terms of the time and labor required, the
 13 novelty and difficulty of the questions involved, or the skill required to represent
 14 Plaintiff and the Class. The customary (i.e., benchmark) fee for common-fund cases
 15 such as this is 25% of the common fund, and awards in similar cases are consistent
 16 with this benchmark. The Court is unaware of anything that would make this case
 17 more "undesirable" than other consumer class actions involving allegations of
 18 deceptive marketing/labeling. Class Counsel does not provide in its Fee Motion
 19 information about any applicable fee agreements, the time limitations imposed by this
 20 case, or the nature and length of Class Counsel's relationship with Plaintiff. The
 21

22 ² The twelve Kerr factors bearing on the reasonableness are:

23 (1) the time and labor required, (2) the novelty and difficulty of the questions involved,
 24 (3) the skill requisite to perform the legal service properly, (4) the preclusion of other
 25 employment by the attorney due to acceptance of the case, (5) the customary fee, (6)
 26 whether the fee is fixed or contingent, (7) time limitations imposed by the client or the
 27 circumstances, (8) the amount involved and the results obtained, (9) the experience,
 28 reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the
 nature and length of the professional relationship with the client, and (12) awards in
 similar cases.

Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir.1975), *cert. denied*, 425 U.S. 951 (1976).

1 Court thus finds no reason to adjust the lodestar amount. An award of \$250,000 is
 2 therefore only slightly below the generous lodestar amount of \$268,851.50. This
 3 confirms that an award of 25% of the Settlement Fund is a reasonable amount.³

4 As for expenses, the Court has reviewed Class Counsel's out-of-pocket costs
 5 and litigation expenses (paid and un-reimbursed, or currently due). (ECF No. 30-1 at
 6 38.) The Court finds Class Counsel's costs and expenses were of a nature typically
 7 billed to fee-paying clients and that said expenses were reasonable and necessarily
 8 incurred in light of the extent of proceedings both in and out of court, the complexity
 9 of the legal and factual issues in the case, the amount at stake in this litigation, and the
 10 efforts of all counsel and parties to this action. The Court thus awards Class Counsel
 11 \$3,997.72 in costs and expenses, to be paid from the Settlement Fund as set provided
 12 in the Settlement Agreement.

13 In further support of the Court's fee and expense awards, the Court notes that
 14 neither Plaintiff nor any Class Member is obligated to pay Class Counsel any further
 15 amounts for attorneys' fees, costs, and litigation expenses in the Action. As no Class
 16 Member objected to Class Counsel's request attorneys' fees, costs, and litigation
 17 expenses were made, the Court concludes that no Class Member is entitled to seek or
 18 receive any further payment of attorneys' fees, costs, or litigation expenses in
 19 connection with this action.

20 **14. Class Representative's Incentive.** Plaintiff, whom the Court appointed
 21 Class Representative in its Preliminary Approval Order, has actively participated in
 22 and assisted Class Counsel with this litigation for the substantial benefit of the Class
 23

24 ³ The Court is not inclined to increase the value of the Settlement Fund based on Defendant's costs
 25 of implementing injunctive relief. While it is true that future customers will have the benefit of
 26 more information on Defendant's packaging, the value of this benefit is not necessarily
 27 commensurate with Defendant's implementation costs. See Staton v. Boeing Co., 327 F.3d 938,
 28 974 (9th Cir. 2003) ("[O]nly in the unusual instance where the value to individual class members of
 benefits deriving from injunctive relief can be accurately ascertained may courts include such relief
 as part of the value of a common fund for purposes of applying the percentage method of
 determining fees.").

despite facing significant personal limitations. Mr. Mason waived his right to pursue potential individual claims or relief in this action. Apart from the requested incentive and his share of the Settlement Fund as will be distributed to the Class in general, Mr. Mason will receive no settlement payments or benefits of any nature. The Court therefore awards \$3,500 to Mr. Mason as Class Representative, to be paid at the time and in the manner provided in the Settlement Agreement. Mr. Mason was actively involved throughout the Litigation and contributed significant time and expense in seeing this action to fruition. The Court approves this incentive payment to compensate Mr. Mason for the burdens of his active involvement in the Litigation and his commitment and effort on behalf of the Class.

15. Class Member Objections. The Court has received no objections to, or requests to opt out of, the Settlement. The Class Action Administrator has similarly received no objections to, or requests to opt out of, the Settlement. (ECF No. 34-2, Retnasaba Decl. ¶¶ 17-19.) To the contrary, the Class Action Administrator has received over 10,600 claims under the terms of the Settlement and anticipates receiving a total of 18,000 claims by the June 5, 2014 claims deadline.

16. Modification of Settlement Agreement. The Parties are hereby authorized, without needing further approval from the Court, to agree to and adopt non-substantive amendments to, modifications of, and/or expansions of the Settlement Agreement, if such changes are consistent with this Order and do not limit the rights of any person or Class Member entitled to relief under this Agreement. All substantive amendments, modifications, and/or expansions shall be submitted to the Court in the form of a joint motion for approval. An example of a non-substantive amendment, modification, and/or expansion includes the need to extend a deadline contained in the Settlement Agreement for administrative purposes.

17. Enforcement of Settlement. Nothing in this Final Approval Order shall preclude any action to enforce or interpret the terms of the Settlement Agreement. Any action to enforce or interpret the terms of the Settlement Agreement shall be

1 brought solely in this Court.

2 **18. Retention of Jurisdiction.** The Court expressly retains continuing
3 jurisdiction as to all matters relating to the Settlement, and this Final Approval Order,
4 and for any other necessary and appropriate purpose. Without limiting the foregoing,
5 the Court retains jurisdiction over all aspects of this case including but not limited to
6 any modification, interpretation, administration, implementation, effectuation, and
7 enforcement of the Settlement, the administration of the Settlement and Settlement
8 relief, including notices, payments, and benefits thereunder, the Settlement Notice and
9 sufficiency thereof, any objection to the Settlement, any request for exclusion from the
10 certified Class, the adequacy of representation by Class Counsel and/or the Class
11 Representative, the amount of attorneys' fees and litigation expenses to be awarded
12 Class Counsel, the amount of any incentives to be paid to the Class Representative,
13 any claim by any person or entity relating to the representation of the Class by Class
14 Counsel, to enforce the release and injunction provisions of the Settlement and of this
15 Order, any remand after appeal or denial of any appellate challenge, any collateral
16 challenge made regarding any matter related to this litigation or this Settlement or the
17 conduct of any party or counsel relating to this litigation or this Settlement, and all
18 other issues related to this action and Settlement. Further, the Court retains
19 jurisdiction to enter any other necessary or appropriate orders to protect and effectuate
20 the Court's retention of jurisdiction provided that nothing in this paragraph is intended
21 to restrict the ability of the Parties to exercise their rights under the Settlement
22 Agreement.

23 **19. No Admissions.** This Final Approval Order and the Settlement, all
24 provisions herein or therein, all other documents referred to herein or therein, any
25 actions taken to carry out this Final Approval Order and the Settlement, and any
26 negotiations, statements, or proceedings relating to them in any shall not be construed
27 as, offered as, received as, used as, or deemed to be evidence of any kind, including in
28 this action, any other action, or in any other judicial, administrative, regulatory, or

1 other proceeding, except for purposes of obtaining approval of the Settlement and the
 2 entry of judgment in this action, enforcement or implementation of the Settlement, or
 3 to support any defense by Defendant based on principles of *res judicata*, collateral
 4 estoppel, release, waiver, good-faith settlement, judgment bar or reduction, full faith
 5 and credit, setoff, or any other theory of claim preclusion, issue preclusion, release,
 6 injunction, or similar defense or counterclaim to the extent allowed by law. Neither
 7 the Settlement Agreement nor any related negotiations, statements, mediation
 8 positions, notes, drafts, outlines, memoranda of understanding, or Court filings or
 9 proceedings relating to the Settlement or Settlement approval, shall be construed as,
 10 offered as, received as, used as, or deemed to be evidence or an admission or
 11 concession by any person, including but not limited to, of any liability or wrongdoing
 12 whatsoever on the part of Defendant or as a waiver by Defendant of any applicable
 13 defense, including without limitation any applicable statute of limitation.

14 **20. Conclusion and Order. IT IS HEREBY ORDERED** that:

15 a. The Fee Motion, (ECF No. 30), is **GRANTED IN PART** and
 16 **DENIED IN PART** with respect to Class Counsel's request for
 17 attorneys' fees and **GRANTED** with respect to Class Counsel's
 18 request for costs, litigation expenses, and Mr. Mason's incentive
 19 payment;

20 b. The Final Approval Motion, (ECF No. 34), is **GRANTED**;

21 c. This action, including all individual and Class claims resolved in it, is
 22 **DISMISSED WITH PREJUDICE**, without an award of attorneys'
 23 fees, costs, litigation expenses, or incentive payments to any party
 24 except as provided in this Final Approval Order. The Clerk of Court
 25 is directed to enter **FINAL JUDGMENT** accordingly.

26
 27 DATED: March 13, 2014
 28


 26
 27 HON. GONZALO P. CURIEL
 28 United States District Judge